BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LISA M. MOORE	)	
Claimant	)	
	)	
VS.	)	Docket No. **1,061,381**
	)	
PRESBYTERIAN MANOR	)	
Self-Insured Respondent	)	

ORDER

Self-insured respondent requests review of the October 18, 2012, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh. William G. Manson, of Kansas City, Missouri, appeared for claimant. Gary K. Jones, of Wichita, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the September 12, 2012, preliminary hearing transcript, with exhibits thereto; the October 17, 2012, preliminary hearing transcript, with exhibits thereto; and exhibits thereto; and, all pleadings contained in the administrative file.

The Administrative Law Judge (ALJ) denied respondent's request to terminate benefits.

ISSUES

Respondent asks that the ALJ's Order should be reversed, arguing that claimant has not met her burden of proof to show she met with an accident arising out of and in the course of her employment or that the alleged accident was the prevailing factor in causing her injury, medical condition and need for treatment.

Claimant argues the ALJ's Order should be affirmed.

The issues presented to the Board for consideration are:

(1) Whether claimant's accidental injury arose out of and in the course of her employment with respondent.

(2) Whether the alleged accident was the prevailing factor in causing claimant's injury, medical condition and the need for medical treatment.

FINDINGS OF FACT

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant worked for respondent as a certified nurse's assistant and is claiming she suffered an accidental injury to her left shoulder at work on June 6, 2012.

There have been two preliminary hearings held in this workers compensation claim. On September 12, 2012, a preliminary hearing was held on claimant's request for medical treatment and temporary total disability benefits. No counsel appeared on behalf of respondent and, after some testimony from claimant, the ALJ, in his Order dated September 13, 2012, ordered respondent to pay for claimant's medical treatment and to pay temporary total disability benefits. Thereafter, respondent filed its Application for Preliminary Hearing, asking for termination of the ordered medical treatment and temporary total disability benefits. A second preliminary hearing was held October 17, 2012.

Claimant described her June 6, 2012, accident as follows:

> I was emptying -- I had emptied a linen bag. I tied it up, and I went to go put it down the chute. I held the chute with my right hand, and I took the bag, like always, and tossed it into the chute, and my arm popped, and I–and it started just hurting, and I told the supervisor that was on charge–in charge, that it was really hurting. She gave me some ibuprofen, and it just didn't work.[1]

Claimant testified the bag of linens weighed approximately 30 to 40 pounds. Claimant reported her injury to Vonnie Jackson,[2] the nickname for Yvonne Jackson, one of the charge nurses for respondent, and was given some ibuprofen for pain. Respondent referred claimant to Dr. Gary Legler. After an evaluation and examination on June 11, 2012, Dr. Legler prescribed some medication and also ordered physical therapy. Claimant was restricted from lifting, pushing or pulling greater than 25 pounds and no excessive use of her left arm above the shoulder. Respondent was not able to accommodate claimant's restrictions. Claimant's last day of work was June 10, 2012.

Claimant had previously injured her left shoulder on or before April 10, 2012, but had returned to work for respondent sometime after April 24, 2012, and performed her regular job duties with no restrictions. On March 28, 2012, claimant was seen at Swope

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[1] P.H. Trans. (Sep. 12, 2012) at 8.

[2] This Board Member assumes claimant was speaking of LaVonne "Vonnie" Jackson

Health Services and told Dr. Kare Lyche she had injured her shoulder at work. The records from Swope Health Services show claimant returned on April 17, 2012, and was again seen by Dr. Lyche. Those records stated, under "History of Present Illness": "Shoulder pain left decided was due to work but since older workmen's comp would not pay got x-rays over at another place . . . ."[3] Claimant was seen again by Dr. Lyche in May 2012, and on June 26, 2012, where the records indicate claimant's shoulder pain was worse with movement and overhead activities.

Claimant described the differences between her shoulder injury of March 2012 and June 2012, stating: "The first one, I just didn't really feel it at all at first. It just–it got worse as time went on. The second one, the June 6, I felt it instantly."[4]

At the September 2012 preliminary hearing, claimant was having sharp pain shooting down from her shoulder to her arm. She indicated it hurts more when she uses her arm. Claimant testified:

> Q. On June 6th of 2012, prior to this incident where you threw the laundry bag down the chute, were you having problems with your left shoulder?
>
> A. No -- well, earlier in the year, I had hurt it. They denied that claim.
>
> Q. Okay. Did that problem resolve?
>
> A. It resolved, and I was working fine. I was doing my work 100 percent by myself.[5]

Claimant saw Dr. Legler on October 1, 2012. Dr. Legler wrote claimant's attorney on October 4, 2012, in response to a question about the prevailing cause of claimant's left shoulder problems. Dr. Legler wrote:

> [I]t is my belief that the June 6, 2012 work accident is the prevailing factor causing the shoulder strain and the symptoms she is experiencing; however, I reserve the right to change my opinion after I review the left shoulder MRI that I ordered and suggested she receive following my October 1, 2012 evaluation. I currently have no evidence suggesting there is some other reason for Ms. Moore's shoulder complaints given she claims to have made a full recovery following her April 10, 2012 shoulder strain.

On October 5, 2012, an MRI of claimant's left shoulder without contrast was performed by Dr. Luke Wilson. The MRI revealed moderate-sized full-thickness tear of the anterior distal supraspinous tendon (rotator cuff tear).

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[3] P.H. Trans. (Oct. 17, 2012), Resp. Ex. C at 14.

[4] P.H. Trans. (Oct. 17, 2012) at 38.

[5] P.H. Trans. (Sep. 12, 2012) at 16.

Dr. Legler again wrote claimant's attorney on October 10, 2012, stating:

> It is my belief that the June 6, 2012 work accident (picking up a bag of linens) was the primary reason for Ms. Moore's rotator cuff tear. I have no reason to believe Ms. Moore sustained the injury in any other way other than the June 2012 work accident. She reported to me that the shoulder strain she experienced in April 2012 healed and was no longer symptomatic as of June 2012. She also told me she was back to work full duty as of June 2012. Also, I have seen no other medical records indicating any other mechanism of injury to explain the rotator cuff tear.

At the October 17, 2012, preliminary hearing, a statement from Yvonne Jackson was entered as an exhibit. Ms. Jackson provided the written statement at the request of respondent. In the statement, Ms. Jackson indicated that on June 6, 2012, about 11:45 p.m., claimant asked for Ibuprofen or Tylenol because her arm was hurting "from when she hurt it before here with a resident."[6] The statement goes on to reveal that at about 5:50 a.m., claimant "stated that it really was hurting when she put the laundry down the shoot [sic]."[7] Ms. Jackson testified at the October 12, 2012, preliminary hearing that claimant did not tell her she was injured on the date alleged. Ms. Jackson agreed that claimant was performing all of her work between April 24, 2012, and June 6, 2012.

A copy of Ms. Jackson's statement was provided to Dr. Legler by respondent's attorney. Upon receipt of the statement, Dr. Legler wrote respondent's attorney on October 15, 2012, stating:

> Under these circumstances I cannot confidently say that the June 6, 2012, incident was the cause or prevailing factor of the rotator cuff tear or the present need for medical treatment. I previously signed letters dated October 4, 2012, and October 10, 2012, stating that the June 6, 2012, accident was the prevailing factor causing the shoulder injury. However those letters were written prior to the time I reviewed the April 10, 2012, records and the statement from Y. Jackson, RN. After reviewing the records and statement the opinions I expressed in those letters have changed.[8]

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b(b) and (c) provides:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable

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[6] P.H. Trans. (Oct. 17, 2012), Resp. Ex. B.

[7] *Id.*

[8] P.H. Trans. (Oct. 17, 2012), Resp. Ex. A at 1.

> to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
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> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(h) provides:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-508(d) defines accident:

> "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2011 Supp. 44-508(g) states:

> "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[10]

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[9] K.S.A. 44-534a.

[10] K.S.A. 2011 Supp. 44-555c(k).

ANALYSIS

1. Accidental Injury

The ALJ found that claimant suffered an accidental injury arising out of her employment. Claimant completed an injury report four days after the accident wherein she wrote that she hurt her left shoulder putting laundry down a chute. In the report, claimant wrote that she told a person named "Bonnie" about the accident on the night of the injury. Presumably, claimant intended to reference "Vonnie," the nickname for Yvonne Jackson.

Claimant's testimony is consistent with the information she wrote in the accident report. She testified her arm popped when she was placing a linen bag down a laundry chute. In the written statement placed in the record to impeach claimant's version of the events, Yvonne Jackson confirmed that claimant told her that "it [the arm] really was hurting when she put the laundry down the shoot [*sic*]."[11] Ms. Jackson testified that the incident was not reported to her "as a new injury or accident."[12]

The record shows that on June 6, 2012, claimant told her supervisor that her arm was hurting because of the same activity described in the formal accident report completed on June 11, 2012. Ms. Jackson testified that during the period prior to the injury, from April 24, 2012, through June 6, 2012, claimant was performing her job without any sign of physical problems. This Board Member finds that claimant has sustained the burden of proving she suffered an accidental injury arising out of and in the course of her employment on June 6, 2012.

2. Prevailing Factor

Respondent relies on an October 15, 2012, letter from Dr. Gary Legler in support of its argument that the injury was not the prevailing factor. Dr. Legler had opined that the described injury was the prevailing factor on two prior occasions. The respondent forwarded the statement of Ms. Jackson and some records from a prior injury to Dr. Legler and asked that he review his opinion. The records provided to Dr. Legler in the successful attempt to have him alter his opinion included records from Dr. Kare Lyche at Swope Health Services. Dr. Lyche treats claimant primarily for diabetes. Claimant first mentioned shoulder pain to Dr. Lyche on March 28, 2012. Dr. Lyche ordered x-rays of the shoulder. Claimant saw Dr. Lyche again in April and May 2012. When claimant returned on June 26, 2012, Dr. Lyche noted that claimant's shoulder pain was worse with movement and overhead activities.

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[11] P.H. Trans. (Oct. 17, 2012), Resp. Ex. B.

[12] P.H. Trans. (Oct. 17, 2012), at 50.

This Board Member finds Dr. Legler's change of opinion on the prevailing factor to be unpersuasive, based upon the information provided to him by respondent. First, the statement of Ms. Jackson is misleading when coupled with her testimony. It is apparent that the prior injury was having no effect on claimant's ability to work. Second, the records from both Dr. Legler and Dr. Lyche support that claimant had a worsening of her condition after June 6, 2012.

An MRI taken on October 5, 2012, shows a full thickness tear of the anterior distal supraspinatatus tendon (rotator cuff). Dr. Legler wrote respondent's attorney after he reviewed the MRI and confirmed his prevailing cause opinion. Dr. Legler treated the claimant for the injury that occurred earlier in 2012 and diagnosed a shoulder strain. At that time, he did not order an MRI. He ordered x-rays and physical therapy. At no time prior to the June 6, 2012, injury did any health care provider mention the possibility of a rotator cuff tear.

It is of note that after claimant's April 10, 2012, injury and before this injury, no MRI was suggested and the claimant released herself to full duty. When she returned to full duty, she worked until she tore her rotator cuff on June 6, 2012. Claimant's description of the injury is consistent with a rotator cuff tear. The ALJ provided an excellent analysis of the differences in Dr. Legler's range of motion findings from April compared to June 2012.

CONCLUSION

1. Claimant suffered an injury by accident arising out and in the course of her employment with respondent on or about June 6, 2012.

2. The work-related injury is the prevailing factor in her disability and current need for medical treatment.

WHEREFORE, the undersigned Board Member finds that the October 18, 2012, preliminary hearing Order of ALJ Kenneth J. Hursh dated, is hereby affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of March, 2013.

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HONORABLE SETH G. VALERIUS
BOARD MEMBER

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Kenneth J. Hursh, Administrative Law Judge